A

NIPPON EXPRESS (M) SDN BHD

v.

CHE KIANG REALTY SDN BHD & ANOTHER APPEAL

B

COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA
MOHTARUDIN BAKI JCA
DAVID WONG DAK WAH JCA
[CIVIL APPEALS NO: B-02-79-01-2012 &
C B-02-135-01-2012]
16 MAY 2013

CONTRACT: *Formation - Valid and binding agreement - Whether signing of SPA was condition precedent or condition which was part of*
D *terms of contract - Whether amount paid was deposit or part payment - Whether binding contract in existence*

CONTRACT: *Terms - Breach - Fundamental terms of contract - Whether time of essence - Timely delivery of vacant possession - Failure*
E *of - Whether agreement terminated*

Nippon Express (M) Sdn Bhd and Nittsu Transport Service Sdn Bhd ('the appellants'), respectively, signed two purchase forms and offer to purchase to purchase two pieces of industrial land from the respondent. It was a term of the agreements that the
F respondent shall construct the infrastructures for the two lands and deliver vacant possession within 30 months from the date of the agreements. The appellants paid the first 5% of the purchase price and agreed that the balance 10% of the purchase price will be paid within 14 days from the date of the purchase forms.
G Subsequently, when copies of the sale and purchase agreement ('SPA') were forwarded for their execution, the appellants requested for certain amendments and postponement of payment of the balance 5%. The requested amendments were agreed to and the appellants made the balance 5% payment for the
H respective lands. However, Nippon subsequently informed the respondent that they could not obtain finance for the purchase of the two lands and requested that they be allowed to purchase only the Nittsu land and transfer the 10% payment made for the Nippon land to the purchase of the Nittsu land and treat that
I payment as the second progressive payment. The respondent rejected the request and urged the appellants to execute the SPA.

The appellants did not comply and instead wrote to the respondent to terminate the agreements on the ground that the respondent had failed to deliver vacant possession of the two lands within 30 calendar months from the date the appellants paid the booking fees. The respondent replied that the amount paid by the appellants had been forfeited on the ground that they had failed to execute the SPA. It was the respondent's contention that no contract had come into existence in view of the appellants' failure to execute the SPA. The appellants' stand was that once the 10% payment had been made, there was in existence a binding contract between the parties on the ground that the requirement to sign the SPA had been waived by the respondent once it had accepted the second 5% payment. The learned trial judge, in dismissing the appellants' claims, found that there was a conditional contract between the appellants and the respondent and that the amounts paid by the appellants to be "deposit payments" as opposed to "part payments" and thus could be forfeited. Hence, this appeal.

Held (allowing appeal, setting aside decision of High Court) Per David Wong Dak Wah JCA delivering the judgment of the court:

(1) The purchase form signed by the respondent specifically states "sale is confirmed upon compliance with item 16 and/or 17". The operative phrase in the form was "and/or" which meant "one or the other or both". In the circumstances, there was a binding contract once the respondents had complied with item 16 (payment of the 10% of the purchase price) or item 17 (signing of the SPA) or item 16 and item 17. (para 28)

(2) What was provided for in the purchase form and offer to purchase was inconsistent and the inconsistency could not be reconciled. In the circumstances, the *contra proferentum* rule came into play. Both documents were drawn up by the respondent and, in view of the inconsistency, the most favourable construction to be given in the context of the case was that there was in existence a binding contract once item 16 was complied with. In the context of this case, item 16 had been complied with when the second 5% payment was made by the appellants. (paras 30, 31 & 33)

(3) Although both items 16 and 17 had to be complied with before a contract could come into existence, the respondent had waived the compliance of item 17 by accepting the second 5% of the purchase price. (para 34)

(4) The respondent, as the innocent party to the alleged breach of the appellants, did not rescind the contract and left the matter in abeyance for some two years. In fact, the respondent had issued a statement of account to the appellants with no indication that the amounts paid had been forfeited. From the evidence, it could be inferred that the respondent did not want to rescind as it was in their interest to keep the appellants as purchasers. (paras 35 & 37)

(5) The timely delivery of vacant possession of the properties must be regarded of "major" importance in the circumstance of this case as cl. 26 specifically provided that "time is the essence of the agreement". It reflected the parties' intention to treat the obligation to deliver vacant possession of the properties within 30 months as a fundamental term of the contract. The appellants had established on the balance of probability that the respondent had breached a fundamental term of the agreements, entitling them to terminate, which they did. (paras 42 & 43)

(6) The learned judge erred when she did not ask the important question of whether the failure to sign the SPA was a condition precedent or a condition which was part of the terms of the contract. The learned judge also erred in embarking in an exercise to determine whether the amount paid was a deposit or part payment. It was unnecessary as she had found that no contract had come into existence and as such the respondent had no contractual right to keep the deposit paid. (para 44 & 50)

Bahasa Malaysia *Translation Of Headnotes*

Nippon Express (M) Sdn Bhd dan Nittsu Transport Service Sdn Bhd ('perayu-perayu'), masing-masing telah menandatangani dua borang pembelian dan tawaran untuk membeli dua bidang tanah perindustrian daripada responden. Adalah menjadi terma perjanjian bahawa responden akan membina infrastruktur bagi kedua-dua tanah tersebut dan menyerahkan milikan kosong dalam tempoh

30 bulan dari tarikh perjanjian. Perayu-perayu membayar 5% harga belian dan bersetuju bahawa baki 10% harga belian akan dibayar dalam tempoh 14 hari dari tarikh borang pembelian. Kemudian, apabila salinan perjanjian jual beli ('PJB') diberikan untuk pelaksanaan mereka, perayu-perayu memohon pindaan tertentu dan penangguhan bayaran baki 5%. Pindaan yang dipohon telah dipersetujui dan perayu-perayu membuat bayaran baki 5% bagi tanah masing-masing. Walau bagaimanapun, Nippon kemudian memaklumkan responden bahawa ia tidak berjaya memperolehi kewangan bagi pembelian kedua-dua tanah tersebut dan memohon bahawa mereka dibenarkan membeli hanya tanah Nittsu dan memindahkan bayaran 10% yang dibuat bagi tanah Nippon kepada tanah Nittsu dan menganggap bayaran tersebut sebagai bayaran progresif kedua. Responden menolak permintaan tersebut dan mendesak perayu-perayu menandatangani PJB. Perayu-perayu tidak mematuhinya dan sebaliknya menulis kepada responden untuk membatalkan perjanjian tersebut atas alasan bahawa responden telah gagal menyerahkan milikan kosong kedua-dua tanah tersebut dalam tempoh 30 hari dari tarikh perayu-perayu membayar wang pengesahan. Responden membalas bahawa jumlah yang dibayar oleh perayu-perayu telah dirampas atas alasan bahawa mereka telah gagal menandatangani PJB. Hujahan responden adalah bahawa tidak wujud kontrak berdasarkan kegagalan perayu-perayu menandatangani PJB. Perayu-perayu menegaskan bahawa apabila bayaran 10% telah dibayar, wujud kontrak yang mengikat antara pihak-pihak atas alasan bahawa keperluan untuk menandatangani PJB telah dikecualikan oleh responden sebaik sahaja ia menerima bayaran 5% yang kedua. Yang arif hakim bicara, dalam menolak tuntutan plaintif, mendapati bahawa terdapat kontrak bersyarat antara perayu-perayu dan responden dan bahawa jumlah yang dibayar oleh perayu-perayu adalah "bayaran deposit" dan bukan "sebahagian bayaran" dan oleh itu boleh dirampas. Maka, rayuan ini.

Diputuskan (membenarkan rayuan, mengenepikan keputusan Mahkamah Tinggi)

Oleh David Wong Dak Wah HMR menyampaikan penghakiman mahkamah:

(1) Borang pembelian yang ditandatangani oleh responden secara khusus menyatakan "jualan adalah sah dengan pematuhan item 16 dan/atau 17". Frasa penting dalam borang tersebut adalah "dan/atau" yang bermaksud "salah satu atau kedua-duanya".

A Dalam keadaan tersebut, terdapat kontrak yang mengikat sebaik sahaja responden mematuhi item 16 (bayaran 10% harga belian) atau item 17 (penandatanganan PJB) atau item 16 dan item 17.

B **(2)** Apa yang diperuntukkan dalam borang pembelian dan tawaran untuk membeli tidak konsisten dan ketidakkonsistenan tersebut tidak boleh selaraskan. Dalam keadaan tersebut, aturan *contra proferentum* terpakai. Kedua-dua dokumen dibuat oleh responden dan, berdasarkan kepada ketidakkonsistenannya, C tafsiran yang terbaik yang boleh diberikan dalam konteks kes adalah bahawa wujudnya kontrak yang mengikat sebaik sahaja item 16 dipatuhi. Dalam konteks kes ini, item 16 telah dipatuhi apabila bayaran 5% yang kedua dibuat oleh perayu-perayu.

D **(3)** Walaupun kedua-dua item 16 dan item 17 perlu dipatuhi sebelum kontrak wujud, responden telah mengecualikan pematuhan item 17 dengan menerima harga belian 5% yang kedua.

(4) Responden, sebagai pihak yang tidak bersalah atas pelanggaran E yang didakwa oleh perayu-perayu, tidak membatalkan kontrak dan membiarkan perkara tersebut begitu sahaja untuk tempoh dua tahun. Pada hakikatnya, responden telah mengeluarkan penyata akaun kepada perayu-perayu tanpa menunjukkan bahawa jumlah yang dibayar telah dirampas. Berdasarkan F keterangan, boleh disimpulkan bahawa responden tidak mahukan pembatalan kerana mengekalkan perayu-perayu sebagai pembeli adalah bagi kepentingan mereka.

(5) Penyerahan milikan kosong hartanah tersebut dalam masa yang G ditetapkan perlu dianggap sebagai kepentingan "utama" dalam keadaan kes ini kerana kl. 26 khususnya memperuntukkan bahawa "masa adalah intipati perjanjian". Ia menunjukkan niat pihak-pihak untuk menganggap tanggungjawab menyerahkan milikan kosong hartanah dalam tempoh 30 bulan sebagai terma H asas kontrak. Perayu-perayu telah membuktikan atas imbangan kebarangkalian bahawa responden telah melanggar terma asas perjanjian yang memberikan hak pembatalan kepada mereka, yang telah mereka laksanakan.

I

(6) Yang arif hakim telah terkhilaf apabila beliau tidak mengajukan soalan penting, sama ada kegagalan menandatangani PJB adalah syarat terdahulu atau satu syarat yang merupakan sebahagian terma kontrak. Yang arif hakim juga terkhilaf dalam meneruskan untuk melaksanakan pertimbangan sama ada jumlah yang dibayar adalah deposit atau sebahagian bayaran. Ia tidak perlu kerana beliau telah membuat dapatan bahawa tidak wujud kontrak dan dengan itu, responden tidak berhak, dari segi kontrak, menyimpan wang deposit yang dibayar.

Case(s) referred to:

Araprop Development Sdn Bhd v. Leong Chee Kong & Anor [2008] 1 CLJ 135 CA ***(foll)***

Central Bank of India v. Hartford Fire Insurance Co Ltd AIR 1965 SC 1288 ***(refd)***

Eastham v. Leigh London and Provisional Properties Ltd [1971] 1 Ch 871 ***(refd)***

Faber Union Sdn Bhd v. Chew Nyat Shong & Anor [1995] 3 CLJ 797 SC ***(foll)***

Foong Seong Equipment Sdn Bhd v. Keris Properties (PK) Sdn Bhd [2009] 1 LNS 442 CA ***(refd)***

Gan Hwa Kian & Anor v. Shencourt Sdn Bhd [2007] 3 CLJ 538 HC ***(foll)***

Ho Kok Cheong Sdn Bhd & Anor v. Lim Kay Tiong & Ors [1979] 1 LNS 29 FC ***(refd)***

Hoo See Sen & Anor v. Public Bank Bhd & Anor [1988] 1 CLJ 768; [1988] 1 CLJ (Rep) 125 SC

Kandasami Kaliappa Gounder v. Mohd Mustafa Seeni Mohd [1983] 2 CLJ 55; [1983] CLJ (Rep) 7 PC ***(refd)***

Lim Eh Fah & Ors v. Seri Maju Padu [2002] 4 CLJ 37 HC ***(refd)***

Malaysia National Insurance Sdn Bhd v. Abdul Aziz Mohamed Daud [1978] 1 LNS 117 FC ***(refd)***

Morello Sdn Bhd v. Jaques (International) Sdn Bhd [1995] 2 CLJ 23 FC ***(dist)***

Trans Trust SPRL v. Danubian Trading Co Ltd [1952] 2 QB 297 ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 40, 56, 57

For the appellant - Moidzuara Mohd (Chong Poh Ken with him); M/s Ong, Chong & Tan

For the respondent - Soh Yukuan (Iylia Syazwani Abdul Jamil with him); M/s Pearly Ng, Soh & Assocs

[Appeal from High Court, Shah Alam; Suits No: MT3-22-421-2003 & MT3-22-422-2003]

Reported by S Barathi

A

JUDGMENT

David Wong Dak Wah JCA:

Introduction

B **[1]** Before us are two appeals which emanated from two civil suits, namely Civil Suit No. MT3-22-421-2003 (Suit 421) and Civil Suit No. MT3-22-422-2003 (Suit 422) which were heard together by the learned judge as the factual matrix was the same except that in Suit 421 the plaintiff is Nippon Express (M) Sdn C Bhd and in Suit 422 the plaintiff is Nittsu Transport Service (M) Sdn Bhd.

[2] The High Court after a full trial dismissed the plaintiffs' claims which resulted in these two appeals by the plaintiffs/ D appellants which we also heard together on 30 January 2013. After giving due consideration to the respective submissions from counsel, we allowed the appeal for reasons which are set out below.

E

Background Facts

[3] The appellant/plaintiff in appeal B-02-79-01-2012 is Nippon Express Malaysia Sdn Bhd while the respondent/defendant is Che Kiang Realty Sdn Bhd. In Appeal No. B-02-135-01-2012, the appellant/plaintiff is Nittsu Transport Service (M) Sdn Bhd while F the respondent/defendant is Che Kiang Realty Sdn Bhd.

[4] In this judgment and for convenience the appellants will be referred to as Nippon and Nittsu respectively when the circumstances require it.

G

[5] The appellants on 5 June 1997 respectively signed two purchase forms and offer to purchase to purchase from the respondent two pieces of industrial land at the respective purchase price of RM3,937,863 (Lot L1-1-013 - Nippon land) and of RM3,891,210 (Lot L1-1012 - Nittsu land) (collectively to be H referred as the two lands). It is a term of the agreements that the respondent shall construct the infrastructures for the two lands and deliver vacant possession of the same within 30 months from the date of the agreements.

I

[6] The appellants had also on the same day paid the first 5% of the purchase prices of RM196,893.16 (Nippon land) and RM194,560.52 (Nittsu land) and agreed that the balance of 10% of purchase price will be paid within 14 days from the date of the purchase forms.

[7] On 11 June 1997 the solicitors of the appellants wrote to the respondent for copies of the sale and purchase agreement. On 12 June 1997, copies of the agreement were forwarded to the appellants' solicitors for execution by Nippon and Nittsu.

[8] On 18 June 1997, the appellants requested certain amendments to the terms and conditions of the sale and purchase agreement and also on 19 June 1997 requested for the postponement of payment of the balance 5% of the purchase price for both lands until such time that the terms and conditions of the sale and purchase agreement have been mutually agreed.

[9] The requested amendments were agreed to on 19 July 1997 subject to the following terms:

> Save and except for the amendments specifically agreed by us as mentioned above, all your other proposed amendment are not acceptable to us.
>
> We further wish to reiterate that no variations, amendments, additions and/or deletion are to be made to the terms and conditions of our Sale and Purchase Agreement and that this letter shall suffice to recognize any variations, amendments, additions and/or deletion agreed by us.
>
> Kindly therefore forward to us the Sale and Purchase Agreement duly executed by your client together with the balance of the 1st 10% of the purchase price within 7 days from the date hereof.

[10] The appellants through their solicitors on 11 August 1997 made the balance 5% payment for the respective lands to the respondent on the following condition:

> Please further note that our clients are forwarding to you the said sum in consideration of the amendments of the Sale and Purchase Agreement (SPA) agreed to by you as confirmed in your letter dated 19/07/1997.
>
> Upon the SPA being duly executed by our clients we shall forward the same for your execution.

[11] On 22 December 1997, Nippon informed the respondent that they could not obtain finance for the purchase of the two lands and had requested that they be allowed to purchase only the Nittsu land and transfer the 10% payment made for the Nippon land to the purchase of the Nittsu land and treat that payment as the second progressive payment.

[12] On 7 January 1998 the respondent rejected the Nippon's request and had further informed it that:

> (21.1) since Nippon had requested to withdraw from their purchase of Lot L1-1-013, the Respondent shall have no alternative but to forfeit the full 10% down payment made; and
>
> (21.2) the Respondent had also reminded Nippon to ensure that Nittsu speedily execute the Sale and Purchase Agreement for Lot L1-1-012 and return the same to the Respondent within the next 14 day, failing which the Respondent shall consider that Nittsu is no longer interested in the purchase, and may as such exercise the forfeiture clause stipulated in the Purchase Form.

[13] On 22 January 1998, the respondent wrote to Nippon to stress that it would be in their best interest to formalise the sale and purchase agreement.

[14] On 26 January 1998, Nippon replied and urged the respondent to reconsider their request as contained in their letter dated 22 December 1997.

[15] On 13 February 1998, the respondent had reminded Nippon and Nittsu as follows:

> Kindly proceed to execute the Sale and Purchase Agreement within seven (7) days from the date hereof failing which we shall deem that you are no longer interested to continue with the aforesaid purchase. Thereafter, we shall be at liberty to dispose of the said property to any other party as we deem fit without further reference to you.

[16] By a letter dated 20 February 1998, the appellants' solicitors wrote to request again to the respondent to allow Nippon to cancel its purchase and to utilise the 10% down payment towards the purchase of the Nittsu land. In the same letter dated 20 February 1998, their solicitors had again requested for an extension of time to execute the sale and purchase agreement for both lots.

[17] By a letter dated 26 March 1998, the respondent rejected the request and requested the appellants to execute the sale and purchase agreements within 14 days from 26 March 1998.

[18] The appellants did not comply with the request to sign the sale and purchase agreements.

[19] On 31 January 2000, the solicitors of the appellants wrote to the respondent to terminate the agreements on the ground that the respondent had failed to deliver vacant possession of the two lands within the 30 calendar months from the date when the Nippon and Nittsu paid the booking fees.

[20] On 16 February 2000, the respondent replied to inform that the amount paid (RM393,786.30 – for Nippon land and RM389,121 – for Nittsu land) by the appellants had been forfeited on the ground that they had failed to execute the sale and purchase agreements.

High Court Decision And Grounds

[21] The learned judge found that the issue before her was whether a contract came into existence when the appellants signed the purchase forms and the offer to purchase and found that there was a conditional contract between the appellants and the respondent.

[22] The rationale of the learned judge's decision can be found in the following paragraph:

> 20. In determining this issue I had considered the intention of the parties as evidenced by the two documents. First, the Purchase Forms. On the second page (page 3 of bundle B and B1), under the heading 'STATUS OF PURCHASE: (sale is confirmed upon compliance with item 16 and/or 17), the contents are formatted as follows:
>
> > In the event that I/we refuse/fail to continue with the purchase of the said property and/or attend to item 16 & 17 within the time stipulated in letters/notices served by CHE KIANG REALTY SDN BHD for whatever reason(s), a sum equivalent to ten per centum (10%) of the purchase price will be forfeited by the Developer/Vendor regardless whether I/we have or have not executed the Sale & Purchase Agreement.

A Thereafter, I/we shall have no further rights claims or interests whatsoever in and to the said property.

21. On the wordings, I had no hesitation in concluding that it was the intention of the parties to commit themselves on this transaction but subject to the fulfilment of the conditions B stated in items 16 and 17. That the Plaintiffs had paid the first of the 10% of the purchase price on the same say that PW1 had signed the Purchase Forms and Offer to Purchase is clear proof of this fact. Then, the correspondences which were exchanged between the solicitors for the Plaintiffs and C the Defendant, thereafter also indicate that the parties wanted to fulfil the conditions stated in item 17.

22. A perusal of the second document which is the Offer to Purchase paragraphs (1) and (2) in that document empathetically repeat the obligations of the parties upon signing the documents. D The relevant paragraphs are stated as follows:

I/we further agree and undertake with you as follows:

1. Within fourteen (14) days from the date hereof, to settle in full the balance 1st ten per centum (10%) of the E Purchase Price and to execute your standard sale and Purchase Agreement in respect of the abovementioned property at the appointed solicitor's office.

2. You reserve the right to forfeit my/our above payment should I/we fail to observe the conditions stated in F item(1) above and upon such forfeiture I/we shall have no rights, claims and/or interest whatsoever in and to the said property.

23. In my view there is no ambiguity in the words used and the sum total of it all is that the contract will only become fully G binding after the conditions in items 16 and 17 have been fulfilled. In cases such as this, the Courts have always taken the view that if the intention of the parties was that a fully binding contract will only come into existence on the fulfilment of a specified act or event, the agreement is merely H conditional upon the said act or event is fulfilled. (see *National Land Finance Co-Operative Society Ltd v. Sharidal Sdn Bhd* 1983 2 MLJ 211.

24. It is therefore my finding that at the time when the Purchase Forms and Offer to Purchase were signed, there I was a contract between the parties but that contract is a conditional one subject to the payment in full of the 10% of

> the purchase price as well as the signing and execution of the SPA. It must also be remembered that the Plaintiffs had the benefit of legal advice. If what the Plaintiffs contended is true which is the contract had come into existence regardless of the execution of the SPA, this fact was certainly never mentioned in any of the solicitor's correspondences. On the contrary, the correspondences in no uncertain terms pointed to the intention of both parties to have the SPA signed and executed.

[23] The learned judge then went on to hold that the amounts paid by the appellants to be 'deposit payments' as opposed to 'part payments' by applying the 'reasonableness' test as expounded by Edgar Joseph Jr FCJ in *Morello Sdn Bhd v. Jaques (International) Sdn Bhd* [1995] 2 CLJ 23; [1995] 1 MLJ 577 and then held that the amounts paid can be forfeited.

Our Analysis

[24] In any contractual dispute, invariably it turns on conflicting interpretations given to it by opposing parties and this case is no exception. To recap, the respondent's contention that no contract had come into existence in view of the appellants' failure to execute the sale and purchase agreements found favour with the learned judge. The appellants' stand is simply that once the 10% payment had been paid; there is in existence a binding contract between the parties on the ground that the requirement to sign the sale and purchase agreement had been waived by the respondent once it accepted the second 5% payment.

[25] At this point, we remind ourselves of what the appropriate approach in such circumstances should be and this is set out by the learned authors in *Chitty on Contracts, General Principles* (30th edn.) at para. 12-072:

> It is not open to the Courts to revise the words used by the parties, or to put upon them a meaning other than that which they ordinarily bear, in order to bring them into line with what the Courts may think the parties ought to have agreed, or what the Court may think would have been a reasonable contract for the parties to make, but, if, from the document itself and the admissible background, the intention of the parties can reasonably be discerned, then the Court will give effect to that intention even though this involves departing from or qualifying particular words used.

[26] The Supreme Court of India in *Central Bank of India v. Hartford Fire Insurance Co Ltd* AIR 1965 SC 1288 expressed the same sentiment:

> Now it is commonplace that it is the Court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the Court has to do. The Court must give effect to the plain meaning of the words however much it may dislike the result.

Is There A Binding Contract

[27] We are sure that the learned judge had applied the principles mentioned by us but where we, with respect, differ is our conclusion which, in essence, is that there was a binding contract between the respondent and appellants. And our reasons are these.

[28] The purchase form signed by the appellants under the section – Status Of Purchase – specifically states that 'sale is confirmed upon compliance with item 16 and/or 17'. The operative phrase is 'and/or' and in simple and plain English they mean "one or the other or both". In this case, there is a binding contract once the respondents had complied with item 16 (payment of the 10% of the purchase price) or item 17 (signing of the sale and purchase agreement) or item 16 and item 17.

[29] The learned judge relied solely on what is stated in the offer to purchase and appears in our view that she did not give due consideration on what is stated in the purchase form. This is an error which the learned judge committed. What the learned judge should have done is ask whether there is any inconsistency between what is stated in the purchase form and the offer to purchase. And if there is a conflict, what should be the correct approach in solving this inconsistency.

[30] It is our considered view that what is provided for in the purchase form and offer to purchase is inconsistent. Under such circumstance, what is stated by the authors in *Chitty on Contracts, General Principles* (30th edn.) at para. 12-078 is instructive and it is this:

Inconsistent or repugnant clauses:

> Where the different parts of an instrument are inconsistent, effect must be given to that part which is calculated to carry into effect the real intention of the parties as gathered from the instrument as a whole, and that part which would defeat it must be rejected ...
>
> However, an effort should be made to give effect to every clause in the agreement and not to reject a clause unless it is manifestly inconsistent with or repugnant to the rest of the agreement ...

[31] It is our view that the inconsistency mentioned by us cannot be reconciled. That being the case, the *contra proferentum* rule comes into play. Lord Brightman in the Privy Council decision in *Kandasami Kaliappa Gounder v. Mohd Mustafa Seeni Mohd* [1983] 2 CLJ 55; [1983] CLJ (Rep) 7; [1983] 2 MLJ 85 at p. 12 (CLJ); p. 88 (MLJ) explains this rule as this:

> There is a principle of construction that if a document *inter partes* contains an ambiguity which cannot otherwise be satisfactorily resolved, it is to be construed adversely to the party who proffered it for execution.

[32] The Federal Court also in the case of *Malaysia National Insurance Sdn Bhd v. Abdul Aziz Mohamed Daud* [1978] 1 LNS 117; [1979] 2 MLJ 29 applied the aforesaid rule on an insurance policy and this is what the apex court said:

> It also seems to me that as between the assured and the insurers, the exception clause in the proviso, on the ordinary principles of construction has, as far as possible, to be read against the insurance company, that is to say if there is a doubt as to its extent and the question were to arise as to the liability of the insurers, the construction most favourable to the assured must be given to him.

[33] It is undisputed that both documents were drawn up by the respondent and in view of the inconsistency mentioned above, we have no choice but to apply the *contra proferentum* rule, the result of which is this. The most favourable construction to be given in the context of this case is that there is in existence of a binding contract once item 16 is complied with. In the context of this case, we say that item 16 had been complied with when the second 5% payment was made by the appellants.

A **Waiver Of Item 17**

[34] Further we wish to say that even if we agree with the learned judge's finding that both item 16 and item 17 had to be complied with before a contract can come into existence, we
B agree with the appellants' contention that the respondent had waived the compliance of item 17 (signing of the sale and purchase agreement) by accepting the second 5% of the purchase price.

[35] We say so for the following reasons. The respondent prior to the appellants' termination letter dated 31 January 2000 had
C never intimated to or terminated the so called conditional contracts. The respondent sees itself as the innocent party to the alleged breach of the appellants when they did not execute the sale and purchase agreements. As the innocent party, the respondent must elect to rescind and if they do not do so, the
D contract subsists.

[36] Volume 9(1) *Halsbury's Laws of England* (4th edn. reissue) at para. 1008 states as follows:

E > The question whether or not an innocent party (B) has elected to rescind is one of fact. An election to rescind must involve unequivocal assertion by B that he regards himself as no longer bound by the contract as a result of the breach, and it has aid that a mere intimidation of acceptance or a repudiation, if followed by no further action on the part of the innocent party, does not
F > rescind the contract. Mere inactivity or acquiescence by B is not necessarily contract probably does not constitute an election to rescind, even if it purports to treat the contract as determined. An effective election cannot be made by B unless he is aware of his rights of election and rescission.

G **[37]** Not only the respondent did not rescind, they left the matter in abeyance for some two years and in fact had issued a statement of account to the appellants with no indication that the amounts paid had been forfeited. We can infer from the evidence
H that the respondent at no time wanted to rescind as it was in their interest to keep the appellants as purchasers. We say so for the simple reason that it had not started any form of construction of the infrastructures since 1997 except for some peripheral land clearing. With that, we now consider whether there is a breach
I on the part of the respondent which justified the appellants' demand for the refund of the amounts paid. (RM393,786.30 – Nippon land) (RM389,121 – Nittsu land).

Nature Of The Breach By Respondent

[38] The relevant provisions relied on by the appellants are cls. 16 and 26 of the sale and purchase agreements which state respectively as follows:

> 16: Delivery of Vacant Possession:
>
> (1) Subject to the Purchaser having paid the Purchase Price payable under Clause 6 (1) and all other monies due under this Agreement and the Purchaser having performed and observed all the terms and covenants on its part under this Agreement to be performed and observed, the Vendor shall deliver vacant possession of the said Plot to the Purchaser within thirty (30) calendar months from the date of this Agreement.
>
> 26: Time Essence of Contract:
>
> Time wherever mentioned herein shall be the essence of the contract in relation to all provisions of this Agreement.

[39] As to the status of the construction of infrastructures to the two lands, this is the evidence of the appellants through PW1:

> Q9: Did Che Kiang Realty perform its obligations to undertake the works described in the fourth schedule of the sale and purchase agreement?
>
> A: No they did not. Other than some initial site clearing works done for the lot, they did not carry out the basic infrastructure works. In any event, Nippon Express did not receive any written notice requesting for progress payments under the Fourth Schedule read with clause 6(3) of the sale and purchase agreement.

This part of evidence was never rebutted by the respondent during the trial in 2011 and this is understandable as the photographic evidence confirms the evidence of PW1. As to when the 30 month period is to commence and expire, we are in agreement with the appellants' contention that it commences from 5 June 1997 when the first 5% was paid and expires on 4 December 1999. This of course had not been complied with by the respondent which gives rise to the appellants' right to terminate which they exercised with their letter dated 31 January 2000.

A **Commencement Of The 30 Months Period**

[40] Our view on the calculation of the 30 month period is premised on the then Supreme Court judgment in *Faber Union Sdn Bhd v. Chew Nyat Shong & Anor* [1995] 3 CLJ 797; [1995] 2 B MLJ 597 where the facts are these. The date of agreement was 27 June 1984 while the deposit was paid on 17 February 1984. The agreement provided for a 36 month delivery period of vacant possession from the date of the agreement and the issue to be determined was when the 36 month period starts to run. The C Supreme Court relied on an earlier case of *Hoo See Sen & Anor v. Public Bank Bhd & Anor* [1988] 1 CLJ 768; [1988] 1 CLJ (Rep) 125; [1988] 2 MLJ 170 where the factual matrix was the same. Despite what is stated in the agreement, the Supreme Court held that for the purpose of ascertaining the date of delivery of vacant D possession, the relevant date when time starts to run is the date on which the purchaser paid the booking fee and not the date of the sale and purchase agreement. This is what Salleh Abas LP said in *Hoo See Sen (supra)*:

> E The Appellants purchased a two storey link house which was to be constructed by the second Respondent for $145,000.00. For this purpose, the Appellants and the second Respondent entered into a sale and purchase agreement on 18 August 1982 by paying a booking fee of $1,000.00 subject to various payments including progress payments. According to clause 18 of the sale and F purchase agreement, which was only signed on 18 March 1983, the building was to be so constructed that the second Respondent had to give vacant possession within 24 months of the date of agreement, i.e. 24 months from the date of payment of payment of booking fees (18 August 1982). This means that by 17 August 1984, vacant possession should have been handed over to the G Appellant ...

The above principle was applied in the case of *Lim Eh Fah & Ors v. Seri Maju Padu* [2002] 4 CLJ 37 and this is what Suriyadi Halim Omar J (as he then was) said:

H

> Despite the submission that the appellant could only commence paying pursuant to cl. 4(1) of the S&P agreement, only after having received financial backing from the fifth appellant (the bank) and a deed of assignment having been executed, hence the assertion that time began to run on 12 June 1993, I found that I argument unacceptable. Apart from the above case of *Faber Union Sdn Bhd* being crystal clear, in the event of the appellant failing

to adhere to the schedule of payment, there was nothing to stop the respondent from imposing interest on the late payments. This right is sufficiently provided for under cl. 8 of the S&P agreement. Any failure on the part of the appellant, if any, to comply with cl. 4, did not extinguish the responsibility of the respondent to fulfil the contract within the stipulated time. One must bear in mind that the date of 17 July 1992 i.e. the deposit payment date, was the date when the contract was struck, and the very date the respondent assumed responsibility to fulfil its part of the bargain. If the date of the signing of the S&P agreement were to be taken as the relevant date, when time started to run for the delivery of the vacant possession, the respondent could willy-nilly pick any dates it favoured to execute the S&P agreement, which would certainly prejudice the interest of the purchaser.

The Court of Appeal in *Foong Seong Equipment Sdn Bhd v. Keris Properties (PK) Sdn Bhd* [2009] 1 LNS 442 also adopted what was said by the Supreme Courts and this is what they said:

[30] As developer, the plaintiff is required to diligently proceed to complete the development project within the time specified in the SPAs, because upon the execution thereof, time effectively started to run against the developer: *Hoo See Sen & Anor v. Public Bank Bhd & Anor* [1988] 2 MLJ 170 SC; *Faber Union Sdn Bhd v. Chew Nyat Shong & Anor* [1995] 3 CLJ 797 SC; and *Lim Eh Fah & Ors v. Seri Maju Padu* [2002] 4 CLJ 37 HC.

Right To Terminate

[41] The question which arises now is whether the appellants are entitled to terminate the agreements. The relevant provisions of law s. 40 and s. 56 of the Contracts Act 1950 which respectively state as follows:

40. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

56. Effect of failure to perform at fixed time, in contract in which time is essential.

(1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much

A

> of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

B **[42]** We are of the view that the timely delivery of vacant possession of the properties must be regarded of 'major' importance in the circumstance of this case. We say this for the following reasons. There is in existence in the agreement cl. 26 which specifically provides that 'time is the essence of the agreement'. This clause reflects the parties' intention to treat the

C obligation to deliver vacant possession of the properties within 30 months as a fundamental term of the contract. This is understandable as any prudent investors in properties would take into account of the 30 months delivery period in planning their financial affairs. It would be unfair to the appellants if they were

D not able to terminate the agreements and obtain a refund of the monies paid so as to enable them to change their plan of investment when they are the innocent parties. It is noteworthy that in the agreement there is provision for the respondent to terminate if the appellants had defaulted in its payments of the

E purchase price. Fairness demands that such reciprocal right is given to the appellants when there is a fundamental breach of the agreement by the defendant. Our view is supported by the case of *Gan Hwa Kian & Anor v. Shencourt Sdn Bhd* [2007] 3 CLJ 538 and *Araprop Development Sdn Bhd v. Leong Chee Kong & Anor*

F [2008] 1 CLJ 135. Justice Abdul Malik Ishak J (as he then was) in *Gan Hwa Kian* in dealing with the same factual matrix as in this case said this:

> Timely performance was a requisite in the present case. It must be construed as a condition of the contract. Thus, any delay in

G performance must be treated as a breach of the contract. It went to the root of the contract.

Similar view was expressed by the Court of Appeal in *Araprop Development (supra)*.

H **[43]** Reverting to the case at hand, it is our view that the appellants had established on the balance of probability that the respondent had breached a fundamental term of the agreements, entitling them to terminate which they did with their letter dated 31 January 2000.

I

Condition Precedent

[44] Before we make the final order and for completion sake, we wish to say that even if we were to agree with the learned judge that there is no concluded contract, she, with respect, erred when she did not ask the important question of whether the 'failure to sign the sale and purchase agreement' is a condition precedent or a condition which is part of the terms of the contract. The significance of such distinction is illustrated in the following cases.

[45] Buckley LJ in *Eastham v. Leigh London and Provisional Properties Ltd* [1971] 1 Ch 871 observed as follows:

> That is not, in my judgment, a condition precedent to the contract at all; it is part of the terms of the contract. You may call it a condition if you please, but it does not make it a condition precedent to the existence of a contract, it merely indicates what is part of the terms of the bargain just as in all contracts for sale the terms of the bargain are customarily described as conditions of sales.

[46] Denning LJ in *Trans Trust SPRL v. Danubian Trading Co Ltd* [1952] 2 QB 297 explained the significance of the distinction:

> Sometime it is a condition precedent to the formation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all. In those cases the stipulation 'subject to the opening of credit' is rather like a stipulation 'subject to contract'. If no credit is provided, there is no contract between the parties. In another cases a contract is concluded and the stipulation for a credit is a condition that is an essential term of the contract. In those cases the provision of the credit is a condition precedent, not to the formation of a contract, but to the obligation of the seller can treat himself as discharged from any further performance of the contract and can sue the buyer for damages for not providing the credit.

[47] In *Ho Kok Cheong Sdn Bhd & Anor v. Lim Kay Tiong & Ors* [1979] 1 LNS 29 where the Supreme Court through the judgment of Lee Hun Hoe Chief Justice (Borneo) observed as follows:

> In the present case any talk about conditions precedent or conditional contract is misleading. It is irrelevant and tends to cause confusion. The facts are clearly distinguishable from *Aberfoyle*'s case. There the contract was conditional on the vendor obtaining a renewal of certain leases. As the conditional precedent was not satisfied there was no contract of sale, the relationship of vendor and purchaser was not created.

A If the appellant were right there would be no contract of sale as condition precedent had not been fulfilled and they should be entitled to a refund of a deposit. The question whether the contract is conditional or not depends entirely on the interpretation of the sale agreement. The 'conditions' agreed by the parties were nothing more than the terms of contract. The fact that a 'condition' is a term of a contract does not make it a conditional contract. There are no conditions precedent in the present case as understood in *Aberfoyle*'s case.

[48] The learned judge in our view had treated the signing of the sale and purchase agreement a condition precedent and this is evident in this part of the judgment:

> 51. My observations in this regard are as follows. Firstly, the SPA remained until today unsigned and unexecuted. The question of terminating the SPA did not arise. **At most it was terminating the transaction.** Secondly, since the SPA remained unsigned and unexecuted, the full effect of its terms and conditions were not brought into play. *As such, I disagreed that the defendant is bound to deliver vacant possession. Likewise the plaintiffs cannot invoke clause 16. This issue, in my view, was a non starter in the first place.* (emphasis added)

The natural consequence of the learned judge's finding of a 'non-existing contract' is simply that the relationship of vendor and purchaser has not been created and accordingly the money paid by the appellants must be refunded. It must be refunded for the simple reason that the respondent without an agreement has no right to keep the amount paid.

[49] To be fair the learned judge did say 'at best it was a termination of a transaction'. Unfortunately she did not elaborate what that transaction is. If it is not a contract for the 'purchase of the two lands' it begs the question what kind of transaction is the learned judge referring to.

[50] It is our considered view that the learned judge also erred in embarking in an exercise to determine whether the amount paid is a deposit or part payment. That exercise with respect is unnecessary for the simple reason that she had found that no contract had come into existence and as such the respondent has no contractual right to keep the deposit paid. Cases referred by the learned judge on this issue are cases which the courts had held that there is in existence an agreement between the parties

and hence had to embark on an exercise as to whether that amount to be forfeited is a reasonable amount in the context of each case for fear of falling foul of s. 57 of the Contracts Act.

[51] For reasons stated above, we allow the appeal, set aside the decision of the High Court, make an order that all deposits be refunded to the appellants and make the following orders:

Civil Appeal B-02-79-01-2012:

(i) The respondent pay the appellant the sum of RM393,786.30.

(ii) Interest at the rate of 8% per annum on the sum of RM393,786.30 from the date of payment of the same to the respondent by the appellant.

Civil Appeal B-02-135-01-2012:

(i) The respondent pay the appellant the sum of RM389,121.

(ii) Interest at the rate of 8% per annum on the sum of RM389,121 from the date of payment of the same to the respondent by the appellant.

[52] On the issue of costs, we make an order that the respondent to pay costs in the sum of RM40,000 for both appeals to the appellant (here and below).